Supreme Court, U.S.

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No. _____

In The

Supreme Court of the United States

October Term, 1998

ROY G. SPECE, JR. AND ROSE MARIE IBÁÑEZ,

Petitioners,

v.

BAYER CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do defendants in a collusive, void settlement-only class action assume the risk that, even if the class is invalidated, they will have to compensate claimants (and counsel for those who have obtained representation) with the consideration promised in the Class Notice when defendants represent that all conditions set forth in the Notice have been met and fail fairly to warn claimants that the settlement class might be voided?

2. Do members of a settlement-only class who file written acceptance of the consideration promised to them in a Class Notice disseminated under the aegis of a United States District Court have a right to all such consideration, or must they accept material diminution in such consideration (including explicit disavowal of reliance on the District Court's fairness finding) unilaterally written into releases promulgated and disseminated by the defendants?

3. Is counsel estopped from promptly seeking review of an order abrogating her fee contracts when, many months earlier and preceding both a final fairness hearing and improper settlement implementation conduct by the defendants, she had cautioned the court about, but had not appealed, the issue that the pending mass tort settlement-only class action contained unethical elements that might later be exploited to the detriment of members of the class or their counsel?

LIST OF PARTIES

ROY G. SPECE, JR. and ROSE MARIE IBÁÑEZ, Petitioners.

BAYER CORPORATION; ARMOUR PHARMACEUTICAL CO.; BAXTER HEALTHCARE CORPORATION; RHONE-POULENC, INC.; ALPHA THERAPEUTICS CORPORATION, Respondents.

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CITATION OF LOWER COURT OPINIONS

The district court order in this case, entered on February 18, 1998, in *Walker v. Bayer Corporation*, No. 96-C-5024 (N.D.Ill.), is unreported. It is reproduced in the Appendix of co-petitioners Mull & Mull (11-29).

The decision rendered by the United States Court of Appeals for the Seventh Circuit on October 19, 1998, in this case is reported at 159 F.3d 1016. It is also reproduced in the Mull & Mull Appendix (1-9).

JURISDICTION

The Opinion sought to be reviewed was handed down by the United States Court of Appeals for the Seventh Circuit on October 18, 1998. Petitioners' timely Petition for Rehearing was denied on November 4, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution states:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; –

> to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

STATEMENT OF THE CASE

A. Jurisdiction of the District Court.

Plaintiffs in this settlement-only class action below claimed jurisdiction vested in the trial court pursuant to 28 U.S.C. § 1332 in that complete diversity existed between the named class representative (a Florida resident) and the defendants, Rhone-Poulenc Rorer and Armour Pharmaceutical Company (organized, New York; principal place of business, Pennsylvania); Bayer Corporation (organized, Indiana, principal place of business, Indiana); Baxter Healthcare Corporation (organized, Delaware; principal place of business, Illinois); and Alpha Therapeutic Corporation (organized and principal place of business, California).

The trial court had jurisdiction over the MDL, generally, under 28 U.S.C. § 1407.

B. Preliminary Facts.

First, it is fact, and not argument, that this, like most mass tort litigation, cannot be understood without making explicit the pressure for closure despite legitimate objection. What is now before the Court is a highly controversial attempted conclusion to the bulk of a protracted, complex, and embittered litigation. Petitioners are virtually the last bastion of resistance. Second, it should also be observed at the outset that these petitioners' (Spece & Ibáñez) appeal below was consolidated, *sua sponte*, with the appeal of Mull & Mull, who are also filing a Petition for Writ of Certiorari herein. Although Spece & Ibáñez will use Mull & Mull's Appendix herein, it must be emphasized that the positions of the two sets of petitioners are different in certain important respects that will be explained below.

C. 1991 to Date.

Petitioners began handling cases for consumers harmed by AIDS-tainted blood products in 1991. By 1993, they were pursuing such cases in both state and federal courts. This mass tort settlement class action arises out of an MDL proceeding involving cases of such consumers pending in the United States District Court for the Northern District of Illinois. One of the MDL cases was *Wadleigh v. Rhone-Poulenc, Inc.*, 157 F.R.D. 410 (1994), a litigation class action filed along with the MDL petition in September of 1993. *Wadleigh* was partially certified on August 17, 1994, and then decertified upon mandamus review by the United States Court of Appeals for the

Seventh Circuit on March 16, 1995, when the defendants (respondents herein and often called "fractionators") argued that a hemophilia/AIDS class action could not meet virtually any Federal Civil Procedure Rule 23 requirements. See *In Re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied sub nom., Grady v. Rhone-Poulenc Rorer, Inc.*, 576 U.S. 867 (1995) (hereinafter "*Rhone*"). Respondents repeated this "shotgun" attack on hemophilia/AIDS class actions in courts throughout the country both before and after *Wadleigh*.[1] This Court denied plaintiffs' Petition for Writ of Certiorari on October 2, 1995.

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[1] They even argued, and successfully so in Florida, that *Rhone* collaterally estopped consumers of AIDS-tainted blood solids from establishing a class action. They similarly defeated an Arizona state-wide class action filed by Spece & Ibáñez. Speaking of the settlement-only class action at issue here, they also argued, in an amicus curiae brief filed in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (hereafter *Amchem*), that adoption of the Third Circuit's reasoning would make the action "illegal." (1996 WL 722038, page 3, Appendix Volume II to Mull & Mull's Petition For Writ Of Mandamus, Exhibit "E," to Exhibit/tab "K.") The various decisions were submitted with respondents' Opening Brief below as Circuit Rule 30(b) Appendix, Exhibit "E," pages 56-93. These materials were not supplied as substantive authority, but only as proof of what actually transpired. They are readily verifiable, respondents cannot in good faith dispute them, and they therefore fit within the logic of judicial notice. See McCormick on Evidence § 330, 396-397 (4th ed., 1992) (lamenting that most courts are overly cautious as to such materials). In *Wadleigh* respondents argued that the impediments to such a class action were insurmountable. For example, there were said to be interminable conflicts among groups of persons with hemophilia. See respondents' pleading (App. 129, especially at 155).

On August 13, 1996, respondents executed a settlement agreement, providing for a settlement-only class, with the MDL Plaintiffs' Steering Committee ("PSC," who were also former *Wadleigh* class counsel). Respondents and the PSC asked the trial court to certify a settlement-only class the next day. The court immediately provisionally certified that settlement-only class action, set a fairness hearing date, and approved the Class Notice: *Walker v. Bayer Corporation, et al.*, No. 96-C-5024.[2]

The class settlement agreement provided that each plaintiff "group" or "family" associated with an AIDS-infected consumer would receive $100,000 (regardless of the strength of each case) net of costs, fees, and liens (if the latter could be resolved), gave respondents an option to back out if there were too many opt-outs, and created a separate fund of $40,000,000 for attorney's fees, and administrative, ADR, litigation, and notice costs. Although the agreement provided that all fees would be

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[2] Despite the parties' explicit recognition of the necessity of this step, however, the trial Court has not, to this date, followed up and finally certified the class. The provisional nature of the trial court's August 14, 1996, Minute Order (Record on Appeal (hereinafter "ROA") #14, referring to the Index of Record in Case no. 98-1770, the only index supplied to Spece & Ibáñez, which Index is the separately bound, Circuit Rule 30(b) Appendix filed with their Opening Brief, Exhibit "A," pp. 1-15), is manifest because the class complaint was only filed that day. Moreover, the provisional nature of both the class certification and the August 14, 1996, fairness finding is explicitly recognized in the relevant documents. See, e.g., the August 13, 1996, Factor Concentrate Litigation Settlement Agreement, page 12, Exhibit "6" to the respondents' February 2, 1998 Reply in Support Of Their Motion To Enforce Judgment With Respect To The Cost and Fee Fund, ROA #76.

paid out of the $40 million fund, it was explicitly stated that there would be separate proceedings on attorneys' fees following the fairness hearing. The preliminary fairness order by the court provided for the same subsequent review of attorneys' fees.[3]

When the trial court inquired as to the advisability of a settlement-only class action in the very case where a litigation class had been rejected by the appellate courts, respondents answered that it was the only mechanism through which the court could control attorneys' fees and make the deal work. The settlement-only class action was openly espoused to be for the purpose of absolutely minimizing opt-outs and allowing the trial court to control attorneys' fees. The settlement offer to the PSC was explicitly conditioned on minimizing opt-outs and acceptance of respondents' stipulations as to the maximum amount that could be compensated for attorneys' fees, and administrative, ADR, litigation, and notice costs.[4]

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[3] See the August 13, 1996, Settlement Agreement, pages 37-39, Exhibit "6" to the respondents' February 2, 1998, Reply In Support Of Their Motion To Enforce Judgment With Respect To The Cost and Fee Fund (ROA #76), and Pretrial Order #32, August 14, 1996. (ROA #6 and App. 34).

[4] The conditions are set forth in the August 13, 1996, Settlement Agreement cited to in note 3. They were reiterated at the August 14, 1996, provisional certification and fairness "hearing." See, e.g., Mull & Mull's January 7, 1998, Opposition To Fractionators' Motion To Adjudicate Liens, pages 5 (alluding to attorneys' fees and citing to respondents' counsel's reference to the need for a class action to control attorneys' fees) and 27 (citing to not only cap on opt-outs but provision for payment of attorneys' fees to PSC only regarding advice whether to opt-in or opt-out). (ROA #71.)

This amount was not based on any calculation of the market value of the attorneys' time or their actual contracts with their clients, nor was there any attempt to estimate the administrative, ADR, litigation, and notice costs. All members of the class, regardless of the merits or market value of their cases, were to receive the same compensation.

These petitioners concluded that the settlement could be implemented so as to be in the best interests of their clients. Those who had weaker cases or just wanted closure could accept the $100,000, while those with stronger cases or a desire to litigate could opt-out. Petitioners also realized that conflicts of interest inherent in the history and structure of the settlement could be exploited in the implementation of the agreement so as to make the transaction unfair to both the clients and their attorneys. Therefore, petitioners called the court's attention to such conflicts of interest and indicated they would not press the issue if the settlement was implemented in good faith.

Specifically, on August 13, 1996, petitioners filed their Certain Arizona Plaintiffs' Response To Motion For Preliminary Fairness Finding And Request For Three Business Day Extension To Allow More Complete Response, stating:[5]

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[5] At pages 2 and 3 of *Walker* District Court docket entry #630, added to the record on appeal pursuant to last paragraph of the trial court's March 11, 1998 Order, Appendix to Respondent's Opening Brief, Exhibit "C," pages 19-49. This objection by these petitioners is one of the differences between them and Mull & Mull. Mull & Mull felt they were ethically bound *not* to raise any such objections.

> "[P]laintiffs wish to lodge an objection to the defendants' probably unethical, in effect, stipulation to the amount of costs and fees, thereby potentially driving a wedge between filed and unfiled cases and certain victims and their attorneys. Plaintiffs waive this objection, but note that the proposed settlement can ultimately be found fair only if: (1) all legitimate costs, which by Arizona law must be paid by the clients, are awarded; and (2) the Court assures that the probable burden of inadequate fees is spread evenly among all the attorneys based on certain criteria commonly applied in attorneys' fees adjudications, including the honoring, when possible, of contracts between counsel and clients in state court litigation."

The trial court said nothing about petitioners' objection, and the parties, including petitioners, began implementing the agreement. However, respondents' inappropriate behavior in the implementation of the settlement made it apparent that the transaction was not being carried out in accord with the settlement agreement or the best interests of consumers or their attorneys. Specifically:

1. Through December of 1997 and beyond, respondents inappropriately stated to appellants and other plaintiffs' counsel that their fee petitions would be looked upon most favorably if they opted-in all their clients.[6]

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[6] See App. 81 (transcript); October 22, 1997, Memorandum Of Points And Authorities In Support Of Response To Motion For Enforcement Of Order; Counter Motion For Orders Setting Expedited Hearing, Requiring Payment Of Sanctions, Payment Of Settlement Monies, Payment Of Liens For All Claimants,

2. In August of 1997, respondents distributed release forms to persons who had elected to accept the consideration set forth in the Class Notice. In these releases, respondents (apparently with the acquiescence of the PSC), without notice to or approval by the court, unilaterally diminished the consideration promised in the Class Notice.[7]

Rescinding Clause Or Releases Exonerating Governmental Bodies, And Taking Jurisdiction Of And Allowing Discovery On Plaintiffs' And Their Attorneys' Claims Of Fraud, Interference With Contract, Unjust Enrichment, And Breach Of Contract, page 13 Circuit Rule 30(b) Appendix to petitioners' Opening Brief, Exhibit "F," pages 94-95, item #2 added to the record by the trial court's May 26, 1998, Order, Spece & Ibáñez not having received any ROA #.

[7] Specifically,

a. Liens would be borne by the settling clients to the extent that respondents had been unable to negotiate reductions and releases;

b. The right to file third-party claims against federal and state government entities was abrogated;

c. The Notice states that "if you have filed a lawsuit against some party other than [respondents], acceptance of this Settlement will not bar you from continuing with that lawsuit, but it could, depending upon the state law applicable to your claim, reduce your total recovery in that lawsuit." The Release includes a provision requiring the Releasor to indemnify respondents for any third-party claims against them.

d. The Release reduced the amount that certain claimants might ultimately receive by requiring signatures of persons who, according to the Notice, became ineligible by failing to either opt-in or opt-out.

e. The release explicitly disavowed the operative effect of the District Court's fairness finding, stating:

3. In October of 1997, respondents defamed petitioners by falsely accusing them of failing to tell their clients about the class settlement offer.[8] The accusation was that petitioners were trying to rob their clients of a chance to opt-in.

Petitioners promptly notified the respondents that they reserved the right to seek attorneys' fees from the respondents themselves if the cost and fee fund proved inadequate, and they objected to the consideration promised in the Notices being diminished in the releases.

On October 7, 1997, respondents sought a declaratory judgment that "[b]efore petitioners' clients can be paid,

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> "Releasors further represent and warrant that in agreeing to the terms of this Release, they have not relied on any finding of the fairness of the terms of the Agreement and/or this Release by any Court, including any determinations made by the Court in the *Walker v. Bayer Corp., et al.* action in the United States District Court for the Northern District of Illinois or in the MDL proceedings pending in that same court. Rather, Releasors have reached their own decisions as to the fairness of the Agreement and this Release in consultation with counsel of their choice or have voluntarily elected not to consult with such counsel. Releasors also represent and warrant that they are not relying on the Court's order barring the filing or pursuit of individual claims and they would agree to the terms of the Release even if the Agreement were not part of a class settlement **but rather a completely private settlement**." [emphasis and brackets added] (See Notice, App. 43; Release, App. 91.)

[8] App. 86 (petitioners' letter to the trial court re this incident).

[they] must waive any right to any payment from the $100,000 settlement or from the [respondents] who pay such settlement, other than any amount this Court may award to them from the Cost and Fee Fund." (p. 6, ¶ 20 – ROA #52.) Petitioners responded both by reiterating that they were not seeking any portion of the $100,000 payments to their clients, but compensation from the respondents, and by filing their October 22, 1997, Response To Motion For Enforcement Of Order; Counter Motion For Orders Setting Expedited Hearing, Requiring Payment Of Sanctions, Payment Of Settlement Monies, Payment Of Liens For All Claimants, Rescinding Clause Of Releases Exonerating Governmental Bodies, And Taking Jurisdiction Of And Allowing Discovery On Plaintiffs' And Their Attorneys' Claims Of Fraud, Interference With Contract, Unjust Enrichment, And Breach Of Contract.[9] The pleading sought the relief described in its caption.

Respondents then filed their December 23, 1997, Motion For Adjudication Of Liens Asserted By Mull & Mull, seeking an injunction against the filing of suits attempting to assert Mull & Mull's claims for attorneys' fees might not be met by the cost and fee fund. The trial court set this and the other motions and counter-motions for hearing on January 7, 1998. On February 18, 1998, the trial court issued its final Order Concerning Certain Claims for Attorney Fees (App. 11).[10] Said Order

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[9] Item #(2) added to the record by the trial court's May 26, 1998 Order, Spece & Ibáñez not having received any ROA #.

[10] The full order consists of both the February 18, 1998, Memorandum Opinion and the docket entry because the Opinion does not even bother to mention certain aspects of the

summarily rejected all claims asserted by petitioners for themselves, their clients, and consumer/clients generally. It also, without there having been any request therefor, enjoined these petitioners from pursuing their claims elsewhere. The February 18, 1998 Order was a Final Order. Petitioners filed a Notice of Appeal from that Order on March 19, 1998. (ROA # 94.)

Petitioners argued, before the trial court and on appeal, that respondents were collaterally, judicially, and/or equitably estopped from controverting that there was no even provisional class action here, but, rather, thousands of individual, "consolidated" settlements. Collateral estoppel was argued to apply because the identical issue of certifiability was raised and actually litigated by respondents in several previous cases (including *Rhone*), respondents obtained final judgments thereon, the certifiability issue was necessary and central to the previous cases, and the finding of non-certifiability was invoked against those same parties herein. Indeed, respondents even successfully argued that collateral estoppel barred relitigation of the certifiability issue by consumers of AIDS-tainted blood solids who attempted to pursue a class action in Florida state court.[11] Similarly, judicial estoppel was argued to apply because respondents repeatedly avowed in courts all over the country the non-certifiability of a class action by consumers of AIDS-tainted blood solids, they had won and benefited from taking that position, and they were now attempting to

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relief requested by Spece & Ibáñez. The docket entry is ROA # 80.

[11] See footnote 1 above.

take precisely the opposite position before the courts below. Also similarly, equitable estoppel was argued to apply because respondents distributed ostensible Class Notices/offers that they knew or should have been aware reasonably would be construed as conditioned solely on events that, according to them, in fact occurred. Consumers reasonably and foreseeably relied on the Notices/offers by opting in ("accepting") and foregoing further litigation, but now respondents were attempting to benefit by taking positions wholly inconsistent with the Notices/offers.

Petitioners further similarly argued that the class action was void because it was a collusive suit rather than an actual "case" under Article II, Section 2 of the United States Constitution. It was argued that because the class settlement *qua* class settlement was a *de facto* and *de jure* nullity from its inception, it could only be conceived of as a series of thousands of individual, "consolidated" settlements. This was argued to be true because equity does not allow a wrongdoer to benefit from his derelictions. If respondents were able to simply walk away from the huge series of transactions that they engineered before the trial court because of their misuse or mistaken use of the class action device, they would be benefiting from their own wrongdoing.

Consumers were argued to reasonably expect they would receive $100,000, be protected from all liens or other claims thereon, and that their attorneys would be paid costs and fees pursuant to existing attorney-client contracts. It was argued that the Notices were sent out under the auspices of the trial court and should be strictly construed in favor of the consumers, even more so than

an insurance contract or prospectus disseminated to potential investors. That respondents represented that these conditions had been met and proceeded with settlements could not be gainsaid because they paid moneys and obtained releases in an ongoing process under the auspices of the trial court.

It was also argued that the attorneys were parties to and/or third party beneficiaries of the contracts consummated by the Claim Forms/acceptances. There was no reason to expect that the trial court would abrogate the contingent fee contracts, except to the extent that the circumstances in rare cases (e.g., acceptance of the case shortly before the Notice and without significant effort having been ventured) might require adjustment. The settlement contracts should at least be construed to provide for quantum meruit recovery to consumers represented by counsel.

The trial court negatively adjudicated the contract, tort, and equitable claims asserted by petitioners for themselves, their clients, and all the consumers without notice, discovery, or an evidentiary hearing. The trial court ordered that respondents need not pay petitioners' clients, abrogated their contingent fee contracts, denied (without discussion) the remainder of the relief they requested for themselves, their clients, and all the consumers, and enjoined them from pursuing their claims in any other forum. The latter relief had not even been requested by respondents against these petitioners; it was only requested against Mull & Mull because the latter had in fact filed such collateral proceedings. In any event, the respondents continued to pay petitioners' clients,

indicating they desired to consummate as many settlements as they could. Petitioners made it clear throughout that they were only seeking quantum meruit recovery and then only in proportion to what was equitable to all similarly situated attorneys. They also stated that they waived any right to even that modicum of relief if it would jeopardize any consumer's $100,000 net recovery.[12]

The Seventh Circuit nevertheless reasoned that although the settlement class action was "downright weird" and questionable both "in its form" and "in its terms", petitioners waived their right to review by failing to appeal from the trial court's May 5, 1997, fairness finding. It accused "appellants" (without distinguishing between these petitioners/appellants and Mull & Mull) of purposely sitting back with their objections so as to induce reliance by the court, the respondents, and the PSC. The reliance was said to be in the form of proceeding with the settlement and paying claimants. Petitioners were also accused of jeopardizing payments to their clients by raising arguments that called the settlement-only class action into question. The Seventh Circuit concluded, without analysis, that Article III was complied with, and that, in any event, it was too late in the litigation to take any remedial steps. (App. 4-9.)

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[12] See, e.g., petitioners' Reply Brief, pages 1-2. The limited relief requested for the attorneys is a second difference between these petitioners and Mull & Mull.

REASONS FOR GRANTING THE PETITION

A. The Petition Should Be Granted Because It Raises The Same Issues As In The Court's Pending *Ortiz v. Fibreboard Corporation*[13] Whether Article III And Federal Civil Procedure Rule 23 Requirements Can Be Met By A Friendly Joint Venture.

Once again, the Seventh Circuit characterized the present settlement-only class action as "downright weird" and questionable "both in its form" "and in its terms." It nevertheless tersely observed that "[a]ll the requirements of Article III were satisfied" and "[e]ven if they had not been, it is unlikely that the settlement could be set aside at this late date." The Seventh Circuit is correct as to its characterization of the class action, but incorrect in its conclusions that Article III has been complied with and, in any event, that it is too late to take remedial steps. Remedial steps would actually consist of enforcing the transaction to its full extent rather than unwinding it.

This settlement-only class action is obviously collusive and defective for the several reasons argued by petitioners below: (1) it was brought by an unrepresentative class representative who admittedly was time barred and had no viable claim on behalf of persons both similarly situated *and* with potential multi-million dollar cases;[14] (2) it was brought by "class counsel" who were the same attorneys who: (a) had lost the certification

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[13] 118 S.Ct. 2339 (1998).

[14] Attachment 17 to Appendix G of Mull & Mull's Petition For Writ Of Mandamus Appendix, at 142.

issue in *Wadleigh*, (b) contractually agreed among themselves to recommend that their clients opt-in to any class action;[15] (c) had earlier, to protect their stake in *Wadleigh*, sought to enjoin the filing of additional state or federal suits by attorneys who wanted protection for their clients in the event *Wadleigh* was decertified (these petitioners were the only ones in the country to contest this ploy, and petitioners were successful in their opposition);[16] (d) admitted the cost and fee fund was capped at an arbitrary figure that likely was not enough to compensate both class counsel and "hometown lawyers," but hoped to nevertheless be paid a significant amount beyond quantum meruit on either a lodestar or percentage of the fund approach at the expense of hometown lawyers;[17] and (e) admitted the defendants were pressuring them to opt-in all clients, first, with the constant threat of invoking the clause allowing negation if there were too many opt-outs and, then, by promising fee petition cooperation for maximum opt-ins;[18] (3) it was proposed by defendants/respondents – who had earlier successfully argued to the trial court and courts throughout the country that no Federal Civil Procedure Rule 23 requirements could be met in either a nation- or state-wide hemophilia/AIDS

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[15] Exhibit 6 to Appendix of Mull & Mull on appeal below.

[16] See Exhibit "D" to petitioners' Appendix to their Opening Brief, pages 50-55.

[17] See, e.g., discussions of petitioner Spece and of the PSC's Mr. Green in the transcript of September 5, 1997, proceedings, petitioners' Appendix to their Opening Brief, Exhibit "I," pages 104-112.

[18] See footnote 6 above.

class action – for the explicit purpose of controlling attorneys' fees and negating individual suits that would be valued by the particular facts and the applicable law in each jurisdiction;[19] (4) it created conflicts of interest both by arbitrarily allowing respondents to set a cap on fees and administrative, ADR, litigation and notice costs and by allowing simultaneous negotiation of awards to the class and to class counsel (class counsel being tempted to ask that some of the total expenditure be allocated to fees, with no offsetting incentive to maximize award to the class so as to thereby enhance the PSC's fees); and, through the limitation on opt-outs, it encouraged undervaluing strong cases, thereby skewing the allocative function of the tort law; and (5) it was adopted by a trial court that first expressed skepticism and then jokingly stated that perhaps the deal could be finished in time to avoid a negative ruling by this Court in what became *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997).[20]

That collusive suits, even ones encouraged by Congress, do not constitute Article III "cases" was settled by this Court's landmark decision in *Muskrat v. United States*, 219 U.S. 346 (1911). Jurisdiction cannot be founded upon a "contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist." *City of Dawson v. Columbia Ave. Saving Fund*, 197 U.S. 178, 181 (1905).

Even if there had been Article III jurisdiction, it is difficult to conceive how one could conclude that this

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[19] See footnote 4 and text thereat above.

[20] *Id.*

"downright weird" settlement-only class met all the requirements of Federal Civil Procedure Rule 23 when the defendants had successfully argued to the trial court and courts all over the country that even state-wide litigation classes could not meet any Rule 23 requirements. Below respondents ignored the latter precedents and made an attempt to distinguish *Rhone* and *Amchem*. Their argument is the weak one that virtually all Rule 23 requirements are met when there is a settlement-only class because the absence of trial basically vitiates all such concerns. *Amchem* did state that settlement can be relevant to application of Rule 23 insofar as manageability of trial is an issue. (117 S.Ct. at 2248.) However, *Rhone* did not turn on that issue. It turned on a determination that, "on balance," a class action was not superior to individual suits because of undue settlement pressure, different state laws regarding existence and scope of duty and proximate causation, and the prospect of subsequent juries overruling the jury in any class trial. (51 F.3d at 1298-1304.) As set forth above, those *and* additional defects and concerns are part and parcel of the instant settlement-only class action.

As to the Seventh Circuit's concern that the settlement has gone too far to unwind, it is born of failure to recognize petitioners' requested relief. As set forth in the Statement of the Case, petitioners seek to enforce consumers' entitlement to the $100,000 net to them *plus* the additional consideration promised to them in the class notice. It is not a question of unwinding the settlement, but of enforcing it to its full extent in light of the applicable law and equities. Enforcing the settlement(s) to its (their) full extent would not rob respondents of their

consideration, but would teach them and future settlement-only class action engineers that there is a price to be paid for: (1) sending out Class Notices that make certain promises without fair warning as to legal defects that make the deal highly suspect, if not frankly void; and (2) unilaterally diminishing in release forms the consideration promised in the Class Notices.

B. The Petition Should Be Granted Because The Seventh Circuit's Opinion Is Directly Contrary To This Court's Decision In *Amchem*.

This point has been explained in sub-heading A. above.

C. The Petition Should Be Granted To Clarify The Tangled Law As To When Attorneys' Fees Issues Are To Be Reviewed, An Important Issue Both As To Which The United States Courts Of Appeals Are In Conflict And That Needs Particular Clarification In The Context Of Class Actions.

This Court has pending before it, in *Cunningham v. Hamilton County, Ohio*, 1999 WL 13529 (January 15, 1999), the issue whether an attorney who eventually withdraws or is disqualified may take an immediate, interlocutory appeal from an order levying attorneys' fees and costs against her for discovery violations. The United States Court of Appeals for the Sixth Circuit answered this question in the negative. *Starcher v. Correctional Medical Systems, Inc.*, 144 F.3d 418, 423-425 (1998), noting that five circuits had gone one way on the issue, while five had gone the other way.

The instant case raises questions that are both identical to and a mirror image of the one presently before the Court in *Cunningham*: May *or* must an attorney immediately appeal the attorneys' fees implications of an order that finds a settlement-only class action to be fair when it is also stated that fees will be paid out of a separate, capped fund, but that determination of the procedures for, substantive criteria for, and amount of fees will be decided at later hearings? The question just put is identical to the one in *Cunningham* insofar as it asks whether an attorney *may* seek such review. The query is the mirror image of the one in *Cunningham* to the extent that it asks whether one *must* seek such review. This latter inquiry is even tougher because it is bound up with the further, similar questions whether the fact that the amount of attorneys fees has not been determined prohibits an appeal or review as to either the merits of the underlying controversy and/or as to any limited attorneys' fees issues that have been determined.

Courts have attempted to avoid having to confront appeals on both the merits of underlying controversies and on the final amount of attorneys fees in three ways: (1) a local practice that requires prompt presentation and determination of all attorneys' fees issues; (2) allowing the district court to postpone entry of judgment on the merits until attorney fees issues have been completely resolved; or (3) permitting, but not requiring, review of decision of an attorney fee issue (such as whether to award fees as opposed to determination of the amount thereof) along with an appeal on the underlying merits. The latter approach was pioneered by the Seventh Circuit. These questions are confounded by the potentially

contending rule that attorneys' fees issues generally are not considered ripe for review until the amount thereof has been fixed. As to all these points, see Charles Wright, Arthur Miller, and Edward Cooper, 15B *Federal Practice and Procedure* § 3915.6 (1992 with 1998 Pocket Part).

The set of review of attorneys' fees questions is so complex that it has led to conflicting decisions by the Fifth and Third Circuits on whether one may or must appeal an attorney fee award against one defendant if there has been a Civil Rule 54(b) judgment on the merits as to that defendant. The Fifth Circuit has held that a fee award as to claims against one defendant that had earlier passed into final judgment under 54(b) could not be final without a second entry of a 54(b) judgment as to the fee award. *Sidag Aktiengellschaft v. Smoked Foods Prods. Co.*, 813 F.2d 81, 84 (1987). The Third Circuit has held that failure to appeal the fee award in the circumstances faced in *Sidag* forfeits the right to appeal after entry of final judgment as to all parties. *Johnson v. Orr*, 897 F.2d 128 (3rd Cir. 1990).

The result in *Johnson* is absolutely unfair and Draconian. The result in the instant case is no less Draconian. If, as required by the courts below, petitioners had appealed the trial court's May 5, 1997, fairness finding on the sole issue that the settlement class action found fair thereby provided that all attorneys' fees would be paid out of a separate, capped fund, respondents and class counsel would have ineluctably argued that the appeal was premature, if not frivolous. After all, the fund might or might not be sufficient to pay the equivalent to contingent fees to individual lawyers as well as a lodestar or percentage of fund recovery to class counsel for the very

reason that the vast majority of the estimated 6,000 victims were not under contract with any counsel. Moreover, not only the amount of fees remained to be set; also remaining to be determined was whether contingent fee contracts would in fact have to be disregarded, the procedures for determining attorneys' fees, and the substantive criteria for awarding attorneys' fees. All these issues were, by explicit determination in the settlement agreement and by order of the court, to be determined in separate, later hearings.[21]

The Seventh Circuit implied that if petitioners were not untimely in their appeal, they were nevertheless equitably estopped because they did not timely call the district court's attention to problems with the settlement-only class action. As pointed out above, the District Court was well familiar with these problems.[22] As explained in the Statement of the Case, moreover, these petitioners early explicitly warned the trial court about the unethical nature of the separate capped fund. Moreover, they reminded the district court of these problems, sought affirmative relief, and then timely appealed once respondents' misconduct in the implementation of the settlement made clear that respondents were attempting to exploit the conflicts of interest petitioners had warned the court about many months before.

It is no doubt tempting to conclude massive litigation by sacrificing the interests of a few troublesome mavericks and disregarding "technical" rules. However,

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[21] See footnote 3 and text thereat above.

[22] See footnote 4 and text thereat above.

important policy interests are threatened along with these few attorneys. Setting the administrative, ADR, litigation and notice costs and attorneys' fees at an arbitrary figure high enough to entice the PSC but perhaps inadequate to compensate attorneys who had been handling individual cases was improper. Elemental fairness requires that costs and fees be compensated consistent with existing, valid markets. Moreover, *all* the substantive and procedural policies of tort law and class action jurisprudence are undercut to the extent that fees awarded to attorneys who initially undertake the risk of litigation and have responsibility for *individual* claims are not adequately compensated. These attorneys (often called "hometown attorneys"), who prefer to pursue the purposes of the tort law through individual representation, are likely not to be willing to fulfill their important functions in the future. This leaves class action litigation by class action attorneys as the only likely alternative. As the Seventh Circuit pointed out in *Rhone*, individual litigation of several suits, even in the context of MDL litigation, might be preferable in certain situations.

D. The Petition Should Be Granted Because The Decision Below Is Contrary To Precedent Of This Court And Of Other United States Courts Of Appeals Indicating That Class Notices Are To Be Strictly Construed And Enforced Because They Are Distributed Under Court Supervision.

This Court observed in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 357 (1978), that "Rule 23 . . . contemplated that the district court routinely must approve the form of the class notice and order how it should be

sent and who should perform the task." The courts' involvement calls for an especially high degree of honesty and disclosure in the Class Notice. Thus, the court in *Gendron v. Shastina Properties, Inc.*, 578 F.2d 1313, 1315 (9th Cir. 1978), construed a class notice in favor of the claimant and against the settlement committee who attempted to exclude her claim under the language of the Class Notice.

Here, on the other hand, the District Court allowed respondents to trash the Class Notice. The District Court blinked at the many respects in which the releases distributed by respondents diminished the consideration promised in the Class Notice. Space does not allow consideration of each of these differences,[23] but typical is the release provision stating that claimants are in no way relying on the court's fairness finding and are executing the releases as if in an individual case rather than a settlement class action certified, found fair, and supervised by a United States District Court. The District Court here purported to justify this provision as a legitimate attempt to insulate respondents from the possibility that claimants would accept the settlement and then nevertheless attempt to file individual suits. This possibility seems far-fetched, unless the court was attempting to obviate suits enforcing the promises made in the Class Notices.

Perhaps this is precisely what the district court had in mind because it also enjoined petitioners – especially these petitioners as to whom an injunction was not even requested – from filing suits in any forum where such an

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[23] See footnote 7 above.

argument might be made. It seems that the district court would, if it could have, prohibited attempted appeal to the Seventh Circuit.

Indeed, the Seventh Circuit has now implied that seeking review in this Court would be unethical by accusing petitioners of improper conduct in merely making the arguments they have made to date. The unfairness of this reasoning is reflected in the inherently contradictory nature of the Seventh Circuit's ruling. It stated that "appellants", without distinguishing between these appellants/petitioners and Mull & Mull, were equitably estopped from raising objections to the settlement-only class action because they supposedly did not raise them before the trial court made a final fairness determination. At the same time, the Seventh Circuit implied that "appellants" were unethical because they jeopardized the settlement payments to their clients by later raising objections to the structure of the settlement itself.

The overall position of the Seventh Circuit is inherently contradictory because it would follow from the Seventh Circuit's logic that petitioners would have been even more unethical and antithetical to their clients' interests if they had earlier rather than later questioned elements of the settlement-only class action. Then they would not have waived, and presumably would have prevailed as to, their objections. After all, the Seventh Circuit said the settlement was "downright weird" and "questionable." In other words, the more unethical petitioners would have been under the Seventh Circuit's logic, the more likely they would have been to prevail on the merits of their claims under the Seventh Circuit's logic; and *vice versa*.

Even apart from this contradiction, the Seventh Circuit's reasoning was unsound because these petitioners did early alert the trial court to the ethical problems with the settlement-only class action. Nevertheless, they conditionally waived their objections under the reasoning that the transaction might be implemented in the claimants' best interests. They balked promptly when respondents' implementation conduct made it clear that respondents intended to exploit the conflicts of interest respondents had built into the transaction. Moreover, petitioners sought to enforce the full consideration promised in the Class Notices, not to deprive the claimants of any consideration. Finally, these petitioners explicitly waived their rights to any personal recovery if their positions were determined to entail the notion that any claimant should be deprived even a penny of his $100,000 net payment called for in the Class Notices. Although the Seventh Circuit accused petitioners of not caring if the deal were destroyed by not allowing sufficient payment to other counsel, these petitioners also made clear that if there were not enough money to fairly compensate all counsel, they should be paid only quantum meruit or a share thereof proportionate to what was able to be paid to all counsel. The class counsel/PSC balked at this because it might threaten their claims to either a lodestar or even larger percentage of the fee recovery.[24]

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[24] See footnotes 12 and 17 above.

CONCLUSION

This Petition should be granted for the several reasons that it raises the same Article III and Civil Rule 23 questions pending before the Court in *Ortiz;* the opinion below is directly contrary to both this Court's *Amchem* decision and precedents of this Court and other United States Courts of Appeals indicating that Class Notices are to be strictly enforced because they implicate the very integrity of the courts; and the law as to when attorneys' fees issues may or must be reviewed is in disarray, thereby undercutting important procedural and substantive policies.

Respectfully submitted this 2d day of February, 1999.

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